IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1405

WINTHROP DRAKE THIES,

Appellant,

—v.—

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

ALFRED BERMAN
SAMUEL M. KOENIGSBERG
Attorneys for Appellant
80 Pine Street
New York, New York 10005
Telephone (212) 344-2040

March 10, 1979

TABLE OF CONTENTS

CITED CASES

STATUTES

OTHER REFERENCES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

WINTHROP DRAKE THIES,

Appellant,

—v.—

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant, WINTHROP DRAKE THIES, appeals from the final judgment of the Court of Appeals of the State of New York, entered October 19, 1978, amended by order of October 26, 1978, which disbarred him under §90(4) of the New York Judiciary Law. The judgment, by a 4 to 3 vote, affirmed the disbarment order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, of March 13, 1978, amended March 23, 1978.

Opinions Below

The majority and dissenting opinions of the Court of Appeals are reported at 45 N.Y. 2d 865 and appear at pp. 1a-3a. The Appellate Division wrote no opinion; its

order is reported at 61 A.D. 2d 1037, and appears at pp. 12a-13a.

Jurisdiction of the Court

The judgment of the Court of Appeals, later amended, was entered October 19, 1978 (5a). The notice of appeal was filed November 3, 1978 in the New York Court of Appeals and the Appellate Division (7a). By order dated January 11, 1979, Justice Marshall extended appellant's time to docket this appeal to and including March 16, 1979 (10a). The Court of Appeals by order dated February 8, 1979, denied appellant's motion for leave to reargue (11a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Questions Presented

1. Whether § 90(4) of the New York Judiciary Law as interpreted and applied here by the State Court of Appeals violates the Fourteenth Amendment in mandating appellant's disbarment, without a hearing, because appellant had been convicted of a Federal felony, with respect to which the sentencing judge found his violation was devoid of moral turpitude, was provoked by the unlawful acts of F.B.I. agents, and warranted only a fine of $500.
2. Whether the drastic change in the state Court of Appeals' long-standing interpretation of § 90(4) of the Judiciary Law between the time of appellant's Federal felony conviction and the time of his disbarment, impermissibly deprived appellant of notice that his conduct would be penalized by disbarment and deprived him of the opportunity to conduct himself so as to avoid

such penalty; thus, whether § 90(4), as here interpreted and applied, violated the void for vagueness principle of the Fourteenth Amendment and punished appellant retroactively in violation of the Ex Post Facto Clause.

3. Whether appellant's automatic disbarment, without consideration of the individualized mitigating factors found by the trial court, and without consideration of the expressed Congressional intention to eliminate the felony classification and effect other significant revisions of the Federal statute under which appellant was convicted and thereafter disbarred, constituted cruel and unusual punishment violative of the Eighth and Fourteenth Amendments.

Statutes Involved

Section 90(4) of the New York Judiciary Law provides that an attorney and counsellor-at-law convicted of a felony, "shall, upon such conviction, cease to be an attorney and counsellor-at-law," and upon presentation to the Appellate Division of a showing of the conviction, his name "shall," by order, be stricken from the attorneys' roll.

18 U.S.C. § 111 provides that one who "forcibly assaults, resists, opposes, intimidates or interferes with" a variety of federal officers engaged in the performance of their duties shall be fined not more than $5,000, or imprisoned not more than three years, or both.

18 U.S.C. § (1) defines a felony as an offense punishable, *inter alia,* by imprisonment exceeding one year.

The texts of the relevant provisions of the Judiciary Law, § 90(4), and of 18 U.S.C. § 111 appear in the appendix hereto at pp. 14a, 15a.

Raising the Federal Question

The amendment to the order of the Court of Appeals recited, although not comprehensively, that questions under the Eighth and Fourteenth Amendments had been presented to it and passed upon (5a, 6a). These had been initially raised in part in appellant's affidavit submitted in support of his *pro se* answer in the Appellate Division, requesting dismissal of the disbarment proceedings; they were repeated in his counsel's affidavit in support of a motion in that court to vacate the disbarment order, and to grant appellant a hearing.[1] Before the Court of Appeals, counsel, in his brief and in oral argument, contended that §90(4) deprived appellant of liberty and property without due process and in violation of the Fourteenth Amendment and the Ex Post Facto Clause, by disbarring him without a hearing, for conduct found by the trial judge not to involve moral turpitude or to negate good moral character, and resulting from provocative and mitigating circumstances; further denied him the equal protection of the laws in that measured resistance to unlawful detention effected by law enforcement personnel is not deemed criminal or a basis for disbarment under the laws of New York; and, by reason of the foregoing, inflicted upon appellant cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Statement of the Case

The "Felony" Conviction. Appellant was convicted of one count of forcibly assaulting, resisting, impeding, etc., a Federal officer engaged in performance of his official

[1] These affidavits form part of the record before the New York Court of Appeals, citations from which are prefixed herein as "R." (R. 31-44, 57-66).

duties (18 U.S.C. § 111), after a jury trial in the United States District Court for the District of New Jersey. He was fined $500.

Appellant, primarily a tax law specialist,[2] with an office in East Orange, New Jersey, had been arrested on May 10, 1976 at a Newark bank, where he had gone with securities sent to him by a client to deliver to a purchaser. On his making the delivery, an F.B.I. agent arrested him on the charge that the securities were considered "stolen or unlawfully converted [bonds] moving in interstate commerce", under 18 U.S.C. § 2315. Appellant was taken peaceably to F.B.I. headquarters, and, five hours later, to the District Court in Newark to appear before the United States Magistrate. The Magistrate read the complaint submitted by an F.B.I. agent and a government attorney in open court and rejected it, ruling that

> "The complaint as it's drafted in the Court's opinion is insufficient to state probable cause. I will not sign this document as it is prepared. You may present it in such way as to establish probable cause to believe that this was claimed." (App. 56-7)[3]

[2] Among his published articles are the following: Thies, "Keogh Plan v. Qualified Corporate Plans", 42 Journ. Taxation (1975); "New Participation Under the Pension Reform Legislation", 41 Journ. Taxation 268 (1974); "Pension Reform Law, 113 Trusts & Estates 564 (1974): "An Estate Planner's Approach to the Professional Corporation", 109 Trusts & Estates 83, 163, 289 (1970); "Professional Service Organizations", 24 Tax L. Rev. 291, 55 (1969).

[3] All quotations from the trial record are prefixed "App. ——", and are from the Appendix filed on the appeal to the U. S. Court of Appeals, 3rd Circuit; although that Appendix was not included in the appellate record before the Court of Appeals of New York, both appellant and appellee quoted extensively therefrom without objection by counsel or the Court. Citations to the Appendix to this jurisdictional statement are indicated by "a" following the page number.

Appellant then stated that he assumed, in view of the finding of insufficiency, that "I'm discharged from the arrest of the F.B.I. and that they must return to me the property that they toook from me." A colloquy ensued in which the Magistrate stated in substance that as an attorney, appellant should know his recourse (App. 77). The proceeding then terminating, appellant stated he was leaving.

He was followed into the corridor by several F.B.I. agents and an Assistant U. S. Attorney. The agents, under one Boyd, surounded appellant, Boyd stopping appellant and stating he was still under arrest. Appellant was pushed onto a bench, around which the agents formed a semicircle. He insisted he was free to leave under the Magistrate's ruling, and urged that the Assistant U. S. Attorney "come over and straighten things out . . . He's a law enforcement officer."[4] When this request was rejected, appellant became further agitated and exclaimed, "This is not Nazi Germany!" He reiterated that he was not under arrest and said he was leaving the courthouse. When he took a few steps toward an exit, agent Boyd blocked him by interposing his body. A scuffle and several blows ensued. With the aid of additional F.B.I. agents and an Assistant Marshal appellant was subdued, handcuffed, and placed in a lockup.

Thereafter, appellant was charged under 18 U.S.C. §111 in a four-count indictment, one count for Boyd and one for each of the other agents and the assistant marshal. The trial judge charged the jury that appellants' detention by the agents was wrongful.[5] The jury found him guilty only

[4] All the factual recitals in the paragraph are from the Federal appellate record referred to in the preceding footnote: App. 218-226.

[5] *Infra*, p. 8.

with respect to Boyd and acquitted him with respect to the other three. As stated, he was fined $500.

This conviction, and a subsequent conviction of appellant and his client for the conversion of securities, were appealed to the Court of Appeals for the Third Circuit. That court unanimously vacated the convictions in the securities case; the government, it held, had failed to establish the commission of a federal crime, 569 F.2d 1268 (1978). The government did not seek review. The assault conviction and fine were affirmed without opinion, and certiorari was denied. 56 L.Ed.2d 84 (1978).

Pertinent Rulings of the Trial Court. In the course of the trial on the assault charge, the district court ruled that once petitioner was brought before the magistrate, "law enforcement custody" terminated, and petitioner was "in the custody of the Court at the Court's disposition" . . . , and "there was . . . no legitimate and legal restraint upon you as soon as Judge Hunt determined that the complaint was insufficient for filing."[6] Accordingly, the Court charged the jury:

> "As counsel informed you, in their summations, I have already ruled that Mr. Thies was free to leave and was under no legitimate restraint after Judge Hunt determined on the afternoon of May 10, that the complaint the Government presented to him was deficient. Any belief to the contrary was, according to my ruling, an error of law."[7]

However, the Court also ruled and charged the jury that notwithstanding the illegality of a detention, a citizen has

[6] App. 146-7.

[7] App. 29.

no right whatsoever to resist officers who, though acting illegally, subjectively and in good faith believed that they had "probable cause." In overruling appellant's objections to this aspect of the charge, the Court stated:

> ". . . I know there are some old cases and you cited them: *Dire* [sic] and *John Bad Elk,* which would indicate you have a right to resist an invalid arrest. I don't go along with those cases.
>
> "I think the Circuit court decisions have adequately distinguished them. I think that are passé"[8] (App. 196-97).

Nevertheless, in imposing sentence on the one assault charge, the District Judge recognized not only the absence of moral turpitude in appellant's conduct, but also the wrongful, provocative nature of the federal agents' acts. The Court said:[9]

> ". . . So all I have got is this kindergarten shouting and pushing match out in the hallway of this court, which I know was partly engendered by governmental ineptitude. If the New York authorities want to make that you [the defendant] are guilty of that offense a vehicle for your disbarment, I suppose there is nothing I can do about it, although I question their judgment . . .
>
> "I am only concerned with this one scuffle in the hallway out there . . .

[8] The decisions referred to by the trial court are: *United States v. DiRe,* 332 U. S. 581 (1948), and *John Bad Elk v. United States,* 177 U. S. 529 (1900). See also, Chevigny, *"The Right To Resist An Unlawful Arrest,"* 78 Yale L. J. 1128, 1130-32 (1969). *Cf. People v. Cherry,* 307 N. Y. 308 (1954), quoted *infra,* p. 21.

[9] The quotations which follow are from App. 218-226.

> "Nobody was hurt. Nobody got more than a sprained thumb . . .
>
> ". . . The Government was wrong in this case. The Government is partly to blame. They egged this man on . . . I am not stating Mr. Thies was in the right. A jury found he wasn't. I am simply saying that the Government is not entirely free from blame in the precipitation of this case and in the precipitation of this altercation that led to this case . . .
>
> "Without then belaboring this case any more than it already has been, in my judgment, a $500 fine would be sufficient punishment for Mr. Thies' fit of pique and temper in the hallway of this courthouse . . ."

The Disbarment Proceeding. The Appellate Division of the New York Supreme Court, Second Judicial Department, under the recently decided *Matter of Chu,* 42 N.Y.2d 490 (October 13, 1977), embodying a sharply revised interpretation of Judiciary Law, § 90(4), from that which had prevailed for the preceding 37 years (*infra,* p. 18), decreed appellant's disbarment for his conviction of violation of 18 U.S.C. § 111 in the assault case. The ruling followed a petition by the appellee, Joint Bar Association Grievance Committee, which recited that violation of 18 U.S.C. § 111, with a possible three years' imprisonment, was a felony conviction, and that, under *Chu,* appellant should be deemed "automatically" disbarred and his name stricken from the roll of attorneys (R. 23-27).

Appellant answered *pro se,* requesting dismissal of the petition on various grounds, and posing constitutional issues. The only response was the service upon him of the court's initial disbarment order (R. 14-16).

Appellant, now represented by counsel, moved, on a substantial showing, for "Vacatur of Improvident Order, for Rehearing and Related Relief" (R. 55-68). The resulting order denied the motion, but the Appellate Division added:

> "[O]n the court's own motion leave to appeal to the Court of Appeals from the said order dated March 13, 1978, as amended by the order dated March 23, 1978, is hereby granted to the respondent [appellant herein].
>
> "In this court's opinion, questions of law have arisen which ought to be reviewed by the Court of Appeals" (13a).

A majority of the Court of Appeals reaffirmed and sharpened the conclusion forecast in *Chu,* that Federal felonies of whatever character, grave or trivial, invoked automatic disbarment under §90(4). Three judges, however, forcefully disagreed with the "unwarranted extension of this disbarment rule to all federal felony convictions," and deplored "this inflexibly harsh rule . . ." "No longer may consideration be given to the gravity of the offense and mitigating circumstances, no matter how compelling; the drastic result is fixed." (3a).

Although neither the majority nor the dissenting opinions discussed appellant's constitutional contentions, the Court of Appeals *"sua sponte"* (4a, 5a) issued an order amending the remittitur to refer to some, but not all of them. On the grounds next set forth this Court is requested to note probable jurisdiction.

The Questions Are Substantial

1. Section 90(4) of the Judiciary Law, as interpreted and applied to appellant by the courts below, violates the Fourteenth Amendment in that it deprives appellant of significant liberty and property without according him due process of law, substantive or procedural; and further denies him the equal protection of the laws. The decision of the court below is not in accord with applicable decisions of this Court.

(A) *Constitutionally Protected Rights.* A lawyer's right to engage in the practice of his profession, once he has satisfied the State's requirements for admission to practice, constitutes a firmly vested liberty and property right, subject to defeasance basically only if, after proper hearing, he shall have been found lacking in "good moral character" or "guilty of moral or professional delinquency." Such has been the repeated pronouncement of this Court over the past century: "It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency," *Ex Parte Garland,* 71 U.S. (4 Wall.) 333, 379 (1866). "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment • • • A state can require high standards of qualification such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a *rational connection* with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-9 (1957, emphasis added). See also *In Re Ruffalo,* 390 U.S. 544 (1968); *Willner v. Committee on Character,* 373 U.S. 96 (1963); *Theard v. United*

States, 354 U.S. 278 (1957); *Cammer v. United States,* 350 U.S. 399 (1956); *Selling v. Radford,* 243 U.S. 46 (1917).

Similarly, the right to pursue a lawful occupation, including, of course, one's chosen profession, has repeatedly been recognized as coming squarely within the liberty and property protected by the Fourteenth Amendment. Thus, in *Cummings v. Missouri,* the Court rebuked the State's Attorney in the following words:

> "The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law . . . He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors." *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 320 (1866).

See also: *Smith v. Texas,* 233 U.S. 630, 636 (1914); *Truax v. Raich,* 239 U.S. 33 (1915); *Hampton v. Mow Sung Wong,* 426 U.S. 88, 102-3 (1976), "to be characterized as a deprivation of an interest in liberty" (Stevens, J.); referred to in dissenting opinion (Rehnquist, J.) as a "*substantive* liberty interest which may not be arbitrarily denied by legislative enactment" (426 U.S. at 120; emphasis in original). *Cf. Perry v. Sindermann,* 408 U.S. 593, 599 (Stewart, J.) (1973). The right to continue in the practice of law, once the requisite qualifications have been demonstrated to and acknowledged by the designated state agency,[10] is thus included in that significant group of established rights "explicitly or implicitly guaranteed by the Constitution" and classed as "fundamental rights." *San Antonio School District v. Rodriguez,* 411 U.S. 1, 142-43 (1973).

[10] In New York, the designated agency is the Appellate Division in each judicial district, assisted by the Committee on Character appointed by the court (Section 90(1) of the Judiciary Law).

(B) *Denial of Due Process.* The statute involved here, however, § 90(4) of the Judiciary Law, has now been held to strip away and destroy these substantive liberty and property rights, without opportunity to appellant for a hearing of any kind, "prior" or otherwise.[11] Appellant vainly sought a hearing to prove that his conviction had been found by the trial judge to be devoid of moral turpitude and without adverse reflection on his honesty, professional integrity or character (*supra,* p. 10). Such a hearing would have been constitutionally meaningful.[12] The courts below did not accord it; it was deemed to have been rendered pointless and futile by § 90(4) as construed in *Matter of Chu* and in the instant case.[13]

In contrast, a prior evidentiary hearing has been found essential by this Court where impairment of substantial rights is claimed, in such diverse circumstances as those of

[11] The following interpretation by the Court of Appeals in *Matter of Donegan,* 282 N. Y. 285 (1940), at 292, has been uniformly followed:

> "It cannot be denied that the requirement of *automatic and irrevocable disbarment for life* provided by the Judiciary Law, is in effect a consequence most severe and partakes of the nature of punishment. Hence, the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed." (Emphasis added.)

A recent legislative enactment, subsequent to the decision herein, is discussed *infra,* p. 27, n.31.

[12] "The hearing required by the Due Process Clause must be 'meaningful,'" *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, 313 (1950). See also *Bell v. Burson,* 402 U. S. 535, 542 (1971).

[13] *Cf. Matter of Rinehart,* 65 A.D.2d 63 (1st Dep't, 1978), and *Matter of Herman,* 65 A.D.2d 103 (1st Dep't, 1978), where the Appellate Division, First Department, had referred proceedings of Federal tax violators for evidentiary disciplinary hearings, but vacated its orders of reference after the decision herein and directed automatic disbarment.

alleged parole violators, *Morrissey v. Brewer,* 408 U.S. 471 (1972); public assistance applicants, *Goldberg v. Kelly,* 397 U.S. 254 (1970); an automobile owner threatened with suspension of his driver's license, *Bell v. Burson,* 402 U.S. 535 (1971); an employee whose salary was subjected to garnishment, *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969). More recently, a taxicab driver, denied a public chauffeur's license without a hearing because he had a significant criminal record of a type that disqualified him "automatically" under a municipal ordinance, was granted effective judicial relief by *invalidation* of the ordinance as violative of the Fourteenth Amendment. *Miller v. Carter,* 547 F.2d 1314 (7th Cir., 1977), *aff'd by equally div'd Court,* 430 U.S. 356 (1978).

Insistence on hearings in the face of legislation failing to specify them is thus not limited to statutes affecting a member of a "suspect class" or the possessor of "fundamental rights." In the present case, as shown above, a fundamental right of appellant has indeed been infringed. But even short of this, the foregoing cases insisted on hearings not on those grounds, but basically because mandated by the imperatives of procedural and substantive due process and equal protection, in safeguarding valuable liberty and property rights.[14]

(C) *Oppressive Nature Of The Archaic State Statute.* The stark classification embodied in §90(4) cannot be justified under an alleged "rational-basis standard." The constitutionally protected liberty and property rights here involved are not comparable with a fanciful "right to governmental employment," *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 314 (1976); nor are they akin to "social welfare legislation," requiring broader discretion in the legislature's "use of available funds and resources," *Weinberger v. Salfi,* 422 U.S. 749 (1975).[15] Here, instead, is an archaic legislative "irrebuttable presumption" based on ill-considered and outmoded concepts of the term "felony" in criminal codes replete with "absurdities and anachronisms."[16]

A felony conviction may, of course, entail moral turpitude and negate "good moral character." But this is by no means inevitable; moral turpitude and professional delinquency may be substantially or wholly absent, as shown by the Court's decision in *Theard v. United States, supra,* 354 U.S. 278, and by the findings of the trial judge in the instant case (*supra,* pp. 8-9). Indeed, under the Criminal Code Reform Bill of 1977 as *passed* by the Senate (S. 1437, 95th Cong., 1st Sess., January 30, 1978), the very conduct of appellant, then still ineptly classified as a "felony" under 18 U.S.C. § 111, is reclassified as a misdemeanor *at most,* and is no crime at all if the federal agents' conduct was "unlawful or lacking in good faith."[17]

[14] So pervasively is this requirement enforced that this Court has *unanimously* held it applicable to the property and liberty rights of prisoners; and *"even when the liberty itself is a statutory creation of the State." Wolff v. McDonnell,* 418 U. S. 539, 558 (1974). (Emphasis added). Justices Marshall and Douglas advocated additional procedural safeguards in behalf of the prisoners. *Cf.* Judge Henry Friendly's analysis in Friendly, *"Some Kind of Hearing,"* 123 U. of Pa. L. Rev. 1267 (1975).

[15] *Cf. Miller v. Carter, supra,* 547 F.2d at 1326 (concurring opinion).

[16] See *infra,* p. 26, for characterization by the Staff Director of the National Commission On Reform of the Criminal Laws, and similar characterizations by leading congressional and governmental spokesmen.

[17] S. Rep. 95-605 (95th Cong., 1st Sess.), by the Senate Committee on the Judiciary (1977), p. 273; S. 1437, *supra,* § 1302, to which the applicable provisions of § 111 were assigned, discussed *infra,* p. 26; and see 16a. The companion House bill, H.R.6869,

The possibility of a theoretical state interest cannot justify this species of "irrebuttable presumption." Such a theoretical state interest is discernible in various cases including *Morrissey, Goldberg, Bell* and *Sniadach, supra,* p. 14, and many others in which this Court struck down statutes that provided for no prior evidentiary hearing. Thus, for example, in *Morrissey,* Chief Justice Burger pointed out:

> "[T]he State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." 408 U.S. at 483.

Notwithstanding that overwhelming state interest in expedition, this Court held that the parolees' basic rights required an evidentiary hearing prior to reincarceration. The Chief Justice stated:

> "Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (Frankfurter, J., concurring) quoted in *Goldberg v. Kelly.* . . . " (*Morrissey v. Brewer,* 408 U.S. at 181).

This "grievous loss" standard was thus applied in the case of two forgers, sentenced respectively to jail sentences of 7 and 10 years, and released much earlier on parole, a status on which the Constitution confers no guaranty. Yet

---

has apparently been delayed by the demands of the American Civil Liberties Union and its supporters for still further liberalized reform of the Federal criminal law; see *"Lawscope"*, American Bar Association Journal, January, 1979, pp. 19-21.

the present appellant, under § 90(4), was not permitted even the slightest evidentiary hearing. Instead he was peremptorily disbarred and ordered to notify all his clients of the tragic fact and of their need to replace him, all with attendant publicity and public obloquy (R. 14-20). Judge Henry Friendly's perceptive observations are especially pertinent:

> "Revocation of a license is far more serious than denial of an application for one . . .
>
> ". . . [A] category ranking high on the procedural scale is the revocation of a license to practice a profession. Here the government is threatening to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely." Friendly, *"Some Kind of Hearing,"* 123 U. of Pa. L. Rev. 1267, 1296-7 (1975).

Appellant, stripped without a hearing of his long-cultivated profession and livelihood and plunged into disgrace, has clearly, no less than in *Morrissey,* been "condemned *to suffer grievous loss.*"

A major source of this denial of justice is the Court of Appeals' recent sharp reversal in *Chu,* 42 N.Y.2d 490 (1977), *supra,* of its previous consistent 37 year interpretation of § 90(4). Under *Chu* summary disbarment attends a conviction of a felony, whether under New York law or that of the Federal or other state government, solely upon the basis of the felony conviction, and regardless of how minor the actual offense or how mitigating the circumstances. This medieval result was denounced herein by the three dissenting judges in the Court of Appeals:

> "No longer may consideration be given to the gravity of the offense and mitigating circumstances, *no matter*

how compelling; the drastic result is fixed. This inflexibly harsh rule needlessly rejects the principle that firm discipline can be achieved *without sacrificing fairness and reason. . . .* " (3a, emphasis added).

No basis exists, of course, for any belief that the New York legislature initially adopted and then retained § 90(4) in consequence of any study indicating "a compelling state interest [that] would justify such a sweeping restriction on a constitutionally protected interest," *Maher v. Roe,* 432 U.S. 464, 474 (1977). No legislative report, whether of this or the last century, was cited in support of the statute, let alone *Chu's* interpretation of it.[18]

In 1940, the New York Court of Appeals, in *Matter of Donegan,* 282 N.Y. 285, held that this statute, "requiring automatic and irrevocable disbarment for life," was so draconian as to require that it be viewed as essentially *penal* (*supra,* p. 13, n. 11). Adopting therefore a strict construction, 282 N.Y. at 292, the court held that the term "felony"

> "include[d] only those federal felonies which are also felonies under the laws of this State, and exclude[d] such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all.' " 282 N.Y. at 292.

Donegan studiously analyzed the protean and ephemeral aspects of the term "felony":

> "At early common law the term 'felony' was applied to describe the more serious offenses cognizable in the

[18] *Cf.* in contrast, the special legislative commission's detailed report on the basis of which the Massachusetts legislature enacted the statute upheld in *Massachusetts Board of Retirement v. Murgia,* 427 U. S. 307, 314-15.

> royal courts, conviction for which entailed *forfeiture of life, limb and chattels* . . . Subsequently, however, the classification was so greatly enlarged . . . that many offenses not involving moral turpitude were included therein (*e.g.,* 'fishing in a private pond by night and breaking the head of a private pond by night or day . . . ')." 282 N.Y. at 289 (emphasis added).[19]

The Court quoted a series of authorities on the vague and diverse meanings of the word. James Madison, for example, had stated:

> " 'Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom . . . It is not precisely the same in any two of the states, and varies in each with every revision of its criminal laws.' " 282 N.Y. at 290.

With felony disbarment thus restricted to New York state felonies, or federal felonies having a New York analogue, the respondent in *Donegan* was not disbarred, and the determination of the constitutional issues was rendered unnecessary. During the following 37 years until *Chu,* New York attorneys convicted of Federal felonies for conduct not constituting felonies under New York law were regularly accorded evidentiary hearings in disciplinary proceedings. In *Matter of Levy,* 37 N.Y.2d 279 (1975),

[19] *Cf.* 2 Stephen, *"History of the Criminal Law of England"* (1883), pp. 192-3: "Felony was substantially a name for the more heinous crimes, *and all felonies were punishable by death* with two exceptions . . . If a crime was made felony by statute the use of the name implied the punishment of death, subject, however, to the rules already stated as to benefit of clergy. Thus, broadly speaking, felony may be defined as the name appropriated to crimes punishable by death. . . . " (emphasis added).

less than two years prior to *Chu*, the Court of Appeals was at pains to point out the importance of permitting the attorney ample latitude to introduce *precisely the type of mitigating and evaluative evidence* that would have assured the present appellant's vindication. The Court's significant statement merits attention:

> "While the issue of guilt may not be relitigated, the attorney may, of course, introduce any competent evidence by means of which *to explain or mitigate the significance of his criminal conviction.* For this purpose . . . the attorney should be permitted to offer any proof which is reasonably relevant to the ultimate issues—*the character of the offense committed* and the nature of the penalty, if any, appropriately to be imposed . . . Thus, there should be received any competent proof which will assist the Appellate Division in the discharge of its difficult and delicate responsibility of determining what sanction, if any be appropriate, will best serve the public interest and at the same time assure the particular attorney *full due process and fairness in the recognition of the substantial interest that is his in his right to practice law.*" (37 N.Y.2d at 281-282; emphasis added).

Had the standards of *Matter of Levy* been applied by the courts below, there would have been no basis for disciplinary action against appellant at all. Measured resistance to an unlawful arrest does not violate New York law. Under the applicable statute, Penal Law §205.30,[20] the

[20] "§ 205.30. *Resisting arrest.* A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from effecting an *authorized* arrest of himself or another person. Resisting arrest is a class A misdemeanor." (Emphasis added.)

prosecution bears the affirmative burden of proving that the arrest was "authorized" and "lawful," *People v. Stevenson,* 31 N.Y.2d 108 (1972); and in any event guilt constitutes a misdemeanor, not a felony. Moreover, the Court of Appeals has hitherto expressed the State's public policy in sensitive and reasoned terms (per Fuld, J.):

> "From the quiet vantage of a library, and after the event, one might look back and figure that defendant should not have done more than remonstrate with his captors . . . For most people, an illegal arrest is an outrageous affront and intrusion—*the more offensive because under color of law—to be resisted as energetically as a violent assault.*" *People v. Cherry,* 307 N.Y. 308, 310, 311 (1954), (emphasis added).[21]

In sharp contrast to the insistence below that conviction of a Federal felony results in automatic *state* disbarment without a hearing, the *Federal courts* significantly hold that conviction of a Federal felony must not result in a *Federal* disbarment unless and until the attorney has been accorded full due process, including an evidentiary hearing and consideration at all mitigating factors. *Matter of Jones,* 506 F.2d 529 (8th Cir., 1974); *In re Ming,* 469 F.2d 1352 (7th Cir., 1972); cf. *Theard v. United States, supra,* 354 U.S. 281-282.

[21] Similar pronouncements have been made on behalf of this Court; *e.g.,* as stated in *United States v. DiRe,* 332 U. S. 581, 594 (1948), Jackson, J.): "One has an undoubted right to resist an unlawful arrest and courts will uphold the right of resistance in proper cases." *Cf., John Bad Elk v. United States,* 177 U. S. 529 (1900). See also opinion of Judge Stevens in *United States v. Holmes,* 452 F.2d 249, 260 (7th Cir. 1971), and opinion of Judge Friendly in *United States v. Edmons,* 432 F.2d 577, 583-5 (2d Cir. 1970).

(D) *Insignificance of "administrative burden."* Evidentiary disciplinary hearings in cases like appellant's would not entail the administrative burden which this Court held in *Mathews v. Lucas,* 427 U.S. 495 (1976), and cognate decisions, could justify the statutory presumptions there involved.[22] To quote Judge Friendly again,

> ". . . [T]he number of individuals involved in . . . disciplinary action in any given period is likely to be relatively small, and generally no other special circumstance justify a curtailment of procedural safeguards." Friendly, *"Some Kind of Hearing," supra,* 123 U. of Pa.L.Rev. 1297.

This conclusion is demonstrable empirically. There are nearly 67,000 lawyers in New York.[23] Statistics compiled by a State bar committee show a total of 65 judicially determined disciplinary cases in 1976 and 88 in 1977.[24] Examination of the cases cited in the Report for 1976 shows that in that year, of 9 attorneys convicted of Federal felonies the names of 3 were stricken, 2 were disbarred, 2 suspended, and 2 merely censured.[25] In 1977, of 19 such conviction 9 attorneys were disbarred or had their names stricken prior to *Chu,* 2 were suspended, and 2 merely

[22] In *Mathews,* the Court stated: "Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience • • • Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable." 427 U. S. at 509.

[23] The New York Times, May 16, 1977, p. 35, from A.B.A. and State bar sources.

[24] New York State Bar Association, Committee on Professional Discipline, *Annual Report on the State of Discipline in New York for 1976* (the first issued), p. 14; *1977,* pp. 20-21.

[25] *Annual Report . . . for 1976, supra,* pp. D1-D11.

censured, and after *Chu,* 6 more were disbarred or stricken.[26]

Assuming even some future increase, by reason of still more lawyers, in the annual average of 12 Federal felony disciplinary cases indicated by the 1976-1977 figures, the holding of evidentiary hearings to consider the nature of the offense and of the respondent's conduct, and any mitigating and explanatory factors, far from being an "administrative burden," would have entailed a relatively slight effort. An "administrative burden" of so little weight surely furnishes no justification for the obliteration of the constitutional rights of the victims of mechanical disbarment under § 90(4) of the Judiciary Law.[27]

(E) *Defective Rationale of Court Below.* In *Chu's* reversal of *Donegan* the Court of Appeals did not purport to be correcting a misunderstanding of the legislature's intent. Rather the court merely substituted for the legislative judgment as previously determined in *Donegan, supra,* its own rationale for arbitrarily *expanding* §90(4)'s

[26] *Annual Report . . . for 1977, supra,* pp. H1-H11. (*Matter of Boklan,* p. H7 is listed as a "[f]elony conviction," without specifying the jurisdiction. No citation for it was discoverable, and it is not included in the above figures.)

[27] While this case presents the special problem of a Federal "felony" conviction, New York state felony disciplinary cases totalled but 4 in 1976, and 6 (including an out-of-state felony case) in 1977. *Annual Report . . . for 1976* and *for 1977, supra.*

The national trend clearly disfavors this type of statute, probably even apart from its constitutional infirmity. As of 1940, 29 states had automatic felony disbarment statutes, approximately 10 applying that sanction to Federal felony convictions. See pp. 24-27 of brief and pp. 32-33 of appendix of the Association of the Bar of the City of New York in *Matter of Donegan, supra.* A recent survey indicates that less than 10 states, at most a third of the earlier total, still have statutes providing for some form of automatic felony disbarment. (*The National Lawyer,* November 27, 1978, p. 15; December 25, 1978, p. 18).

standard for summary disbarment to include, instead of to *exclude,* Federal felonies not deemed felonies by New York.

After stating that

> "... conduct judged by Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment," 42 N.Y.2d at 493,

the court added:

> "[W]e now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline." 42 N.Y.2d at 494.

The court pointed out that a New York felony statute closely paralleled the Federal statute violated by the respondent Chu, and that "... it is *the underlying conduct of the attorney* which calls for disciplinary response ...". 42 N.Y.2d at 494 (emphasis added). But in the very next case, that of appellant here, the court swept aside and entirely disregarded the lack of a New York parallel.

The court below also rejected any inquiry into "the underlying conduct" of appellant. It bluntly explained that if such basic elements of due process were accorded in Federal felony disbarment proceedings, principle would demand *similar due process elements* in state felony disbarment proceedings. Referring to the protests of the dissenters, the majority stated:

> "If, as they urge, consideration should be given to the gravity of the offense and to mitigating circumstances, on principle this would seem to be equally true with respect to convictions for New York felonies.

> Yet, as the dissenters recognize, the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld." (2a).

The paradoxical and self-defeating nature of the attempted justification is too obvious to merit discussion.[28] Moreover, it is to be observed that the opinion cites no authority for the last quoted sentence. In fact, only some lower New York courts, but not its Court of Appeals or any Federal appellate courts, have ever addressed the constitutional issues in §90(4). In *Donegan,* as noted earlier, the interpretative result skirted any constitutional scrutiny.

Two additional paradoxical points stand out in the decision below. First, having stated in *Chu* that it is the *conduct of the attorney* which invokes the discipline, rather than the felony label tagged on it, the court nevertheless here *rejected* the demand that this decisive element of conduct should be the subject of testimony and evaluation. The implied if irrational justification was that the conduct came within the specified *classification.* The fact that the conduct evinced no moral turpitude nor otherwise reflected on appellant's professional or personal integrity was thus deemed without significance. Equally ignored was the enormous distortion of inflating this "scuffle in the hallway", as the trial judge termed it (*supra,* p. 8) into a devastating disbarment; all the more so in view of the judge's finding that it was provoked by the *wrongful* acts of the federal agents.

Secondly, in concluding that the Congressional judgment, fastening a felony label on criminal statutes like 18 U.S.C.

---

[28] As pointed out in preceding note 27, the number of state felony disciplinary proceedings in New York totalled only 10 in the 2 year period 1976-7; accordingly their hearings could scarcely have been "burdensome".

§111, was to have *conclusive* effect in disbarring New York lawyers, the 4 majority judges in *Chu* ignored the perceptive admonition of their 3 "concurring" colleagues against fullscale blind absorption of the Federal criminal code. 42 N.Y.2d at 495. It is plainly evident the court majority made no effort to ascertain the *actual* state of Congressional judgment, currently and for several decades past, with respect to the Federal criminal code. Had the majority done so, it would have become aware that Congress has clearly manifested its judgment that the current criminal code is replete with "absurdities and anachronisms;"[29] that in consequence of continuous striving, the Congressional judiciary committees have reported out during the past 10 years a series of bills embodying sweeping revisions of the criminal code, and the Senate has *already approved* the latest reform bill, S.1437, "Criminal Code Reform Act of 1977" (95th Cong., 1st Sess.); and that thereunder the statute appellant was accused of violating, 18 U.S.C. §111, would be replaced by §1302, "Obstructing a Government Function by Physical Interference." Such re-

[29] So characterized in Schwartz, *"Report of the Federal Criminal laws: Issues, Tactics and Prospects"*, 1977 Duke L. J. 171, 174. Professor Louis B. Schwartz served as Staff Director of the National Commission on Reform of the Criminal Laws, established by Congress in 1966.

Attorney General Bell, testifying in support of S. 1437 (95th Cong. 1st Sess.), the latest version of the proposed revision and codification, expressed himself similarly: "Almost all of us in this hearing room know firsthand that existing Federal criminal laws are in serious need of revsision * * * We have *a crazy quilt of laws now* in many areas." (Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., pp. 8593, 8597; emphasis added).

One of the most active members of the Senate Committee in charge of this legislation, Senator Edward Kennedy (currently chairman of the Senate Judiciary Committee), put the matter even more bluntly: "The plain fact is that the current Federal Criminal Code is a disgrace . . . The current Code is archaic. Many provisions should have been repealed years ago." (Cong. Rec., May 2, 1977, p. S6839).

vision would reconstitute appellant's offence at most a misdemeanor, and in all likelihood would result in a *dismissal,* inasmuch as "unlawful" conduct and lack of "good faith" by a government agent are made specific defenses.[30]

Thus is demonstrated the wisdom of the ruling in *Donegan* that the term "felony conviction" in § 90(4) of the Judiciary Law was to be limited to felonies under New York law, or Federal felonies substantially identical. The New York legislature would at least possess knowledge, as well as control, of felony statutes adopted or proposed by its members. The New York courts would possess accurate knowledge of such enactments and presumably of the legislature's views, and could thus avoid *illusory surmises* with respect to mistaken or repudiated views such as were engaged in by the court below.[31] Moreover, to predicate disbarment of New York lawyers on violations of the Federal felony laws, subject at all times to Congressional revisions and additions, constitutes a highly questionable and controversial delegation of the New York legislature's authority. Effective control by a state of standards of behavior of its own bar would be undermined. Such considerations clearly lend added weight to the characterization of the majority's decision by the dissenters as *"aberrational"* (3a).

[30] The text of § 1302 of the Senate Bill is set forth in the Appendix at 16a, 17a. The analogous section in the companion bill, H.R. 6869 (95th Cong., 1st Sess.), also numbered § 1302, is similar. See *supra,* p. 15, n.17.

[31] Indicative of the fact that the New York legislature does not at the present time favor automatic lifetime disbarment of attorneys solely on the basis of a felony conviction, was the enactment at the last legislative session in 1978 of a statute authorizing the submission of applications for re-admission 7 years after disbarment, subject to conditions (1978 Session Laws, Chapter 782, effective Dec. 7, 1978). It is obvious, however, this statute does not eliminate the constitutional infirmities herein discussed.

2. As interpreted and applied in this case, §90(4) of the Judiciary Law was invalid under the "vagueness" principle, and by retroactive application as an ex post facto law.

This appellant was convicted under 18 U.S.C. §111 on November 22, 1976, approximately one year *prior* to *Chu*. Thus, as of the date of conviction, the controlling interpretation of §90(4) by New York's highest court was that rendered in *Donegan*, consistently reaffirmed over a period of 37 years (*supra*, pp. 18-19). Its most recent reaffirmation was in 1975 in *Matter of Levy, supra*, where the Court of Appeals, referring approvingly to the holding of the Appellate Division, stated:

> "It was recognized that the automatic disbarment provision of subdivision 4 of section 90 of the Judiciary Law did not apply, since the term 'felony' in that section does not include 'an offense defined as a felony by Federal statute, which, if cognizable under the laws of New York would at most be a misdemeanor.' *Matter of Donegan*, 282 N.Y. 285, 288-289." (37 N.Y.2d at 280-281).

Yet a scant two years later, *Chu* declared precisely the *opposite*. It is thus evident that §90(4) falls squarely within the condemnation of the "void for vagueness" principle repeatedly upheld by this Court. No statute could be more "vague" than one which is susceptible of two *diametrically opposed* conclusions on the identical *vital* point. As succinctly summarized by Justice Frankfurter:

> "Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards offends Due Process . . . ". *Burstyn Inc. v. Wilson*, 343 U.S. 495, 532 (1952; concurring opinion).

Accord: Baggett v. Bullitt, 377 U.S. 360, 374 (1964), *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243 (1932); *Connolly v. General Construction Co.*, 269 U.S. 385, 393 (1926).

Here, vagueness in the term "felony" was in no sense a matter of mere academic interest. Had appellant been aware prior to his conviction on November 22, 1976, of the vagueness of the term "felony" in §90(4) which, 11 months later in *Chu*, opened wide the door to his subsequent automatic disbarment under the *drastically enlarged* interpretation of "felony," he would have been alerted in all likelihood to the need to seek a safeguard against the consequent calamity. To cite one obvious possibility, he could have reasonably anticipated that, given the borderline nature of the government's case (as evidenced by the trial judge's comments and subsequent fine of merely $500), a plea-bargaining offer to plead to a misdemeanor would have met with ready acceptance by prosecutor and Court in the interest of judicial economy and expedition. But appellant was *not* apprised of the need to seek this alternative, and was thus deprived of notice and "fair warning".

The Court of Appeals has characterized this disbarment statute, though not technically criminal, as essentially penal (*supra* p. 13, n. 11). This Court has expressed a like view with respect to disbarment proceedings: *In Re Ruffalo*, 390 U.S. 544, 550 (1968), "Disbarment . . . is a punishment or penalty imposed on the lawyer." Accordingly, there is compelling basis for the application here

of the ban on *ex post facto* penalties.[32] As stated by Justice Powell for the Court, in *Marks v. United States,* 430 U.S. 188, 191 (1977):

> "[T]he principle on which the [*Ex Post Facto*] Clause is based—the notion that persons have a right to fair warning of that kind which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty . . . As such, the right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie v. City of Columbia,* 278 U.S. 347 . . . , a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on *an unexpected construction of the state trespass statute by the State Supreme Court*:
>
> " '[A]n unforeseeable judicial enlargement of a criminal statute applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.' *Id.* at 353-354 . . . ". (Emphasis supplied).

Since the Court of Appeals itself termed *Chu* "a *significant departure* from our prior holding . . . " (1a), the fore-

[32] In *Burgess v. Salmon,* 97 U. S. 381, 385 (1878), the Court struck down an increase in an excise tax on tobacco declared effective several hours after a sale transaction affected thereby, on the ground that such tax increase would violate the Ex Post Facto Clause. The Court, citing *Cummings v. Missouri* and other *civil* decisions, stated: "The cases hold that the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."

going principle is fully applicable to *Chu's* prejudicial reversal of *Donegan* subsequent to appellant's conviction of the Federal felony, and his automatic disbarment resulting from this "unforeseeable judicial enlargement" of the statute.

3. Appellant's retroactive disbarment without "consideration of the offender and the offense to arrive at a just and appropriate sentence," is barred by the Eighth Amendment.

From its penal aspect, this case is comparable to the statutory denationalization of a soldier previously convicted of desertion, which this Court struck down as essentially a penal law barred by the Eighth Amendment, *Trop v. Dulles,* 356 U.S. 86 (1958). Applicable here is the holding of that decision:

> "We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society." (356 U.S. at 101).

The ruling below, if allowed to stand, will equally impose the effective *destruction* of appellant's status in organized society, in psychological, economic and spiritual terms. And this catastrophe will have been inflicted upon him without his having been granted the slightest hearing at which he could present evidence by which the appropriateness of total disbarment to the offense of the appellant and his character could be evaluated.

More than 40 years ago, the Court in a non-capital case held:

"For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania, ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55 (1937).

The Court recently reaffirmed this standard in dealing with sentences of drastic impact. In *Woodson v. North Carolina,* 428 U.S. 280, 303 (1976), the opinion of Justices Stewart, Powell and Stevens, citing the *Ashe* decision, *supra,* asserted:

"A third constitutional shortcoming of the North Carolina statute is its failure to allow the *particularized* consideration of relevant aspects of the character and record of each convicted defendant * * * Consideration of both *the offender and the offense* in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development." (428 U.S. at 303, 304; emphasis added).

To the same effect, the court below stated in the opinion written by its current Chief Judge in *People v. Davis*:

"So, too, plainly and simply and without verbiage, because the New York statute 'does not allow consideration of *particularized mitigating factors*' for purposes of 'the capital sentencing decision' as to 'the particular offender,' it is *unconstitutional.*" *People v. Davis,* 43 N.Y.2d 17, 33 (1977) (Emphasis added).

The *Woodward* and *Davis* decisions dealt in each instance with a conviction that might terminate a petitioner's life. Its principle should be deemed applicable in substantial measure to the enforced termination of appellant's deeply-prized professional life even by those who may not fully concur in the view enunciated by Justice Douglas: "The right to work, I had assumed, was the most precious liberty that man possesses." [33]

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction, and should reverse the decision below.

Dated: March 10, 1979

Respectfully submitted,

ALFRED BERMAN
SAMUEL M. KOENIGSBERG
Attorneys for Appellant
80 Pine Street
New York, New York 10005
Telephone (212) 344-2040

[33] Dissenting opinion, *Barsky v. Board of Regents,* 347 U. S. 442, 472 (1954).

APPENDICES

APPENDIX A: ORDERS AND OPINIONS

Opinion of New York Court of Appeals and Dissenting Opinion

STATE OF NEW YORK

COURT OF APPEALS

OPINION

2 No. 389

In the Matter of WINTHROP DRAKE THIES,
an attorney and counselor-at-law.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent,

WINTHROP DRAKE THIES,

Appellant.

(389 Alfred Berman, NY City, for appellant.

Nicholas C. Cooper, Brooklyn, for respondent.

PER CURIAM.

We decline the invitation to reconsider our decision of but a year ago in *Matter of Chu* (42 NY2d 490) in which we held that, under subdivision 4 of section 90 of the Judiciary Law, conviction of a federal felony works an automatic disbarment in New York State of a defendant attorney. We then held that it is immaterial that there is no felony analogue under our State statutes matching the federal felony. As we then noted, this marked a significant depar-

ture from our prior holding in *Matter of Donegan* (282 NY 285).

The thrust, if not the particular application, of the expressions of concern by our dissenting brothers pertains to the statutory mandate that "[a]ny person being an attorney and counselor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counselor-at-law, or be competent to practice law as such" (Judiciary Law, § 90[4]). If, as they urge, consideration should be given to the gravity of the offense and to mitigating circumstances, on principle this would seem to be equally true with respect to convictions for New York felonies. Yet, as the dissenters recognize, the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld.

In *Chu,* for the reasons there articulated we concluded "that the conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. * * * We now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline" (pp. 493-494, footnotes omitted). Nothing has occurred in the intervening months to compel a different conclusion.

The order of the Appellate Division should be affirmed, without costs.

Mtr. of Thies, an Attorney

No. 389

Wachtler, Fuchsberg, Cooke, JJ. (dissenting)

While we agree with the majority that summary disbarment of a New York attorney convicted of a New York State felony is mandated by statute (Jud. Law § 90 [subd. 4] as interpreted by prior decisional law (*Matter of Donegan,* 282 NY 285), we dissent from an unwarranted extension of this disbarment rule to all federal felony convictions. Today's decision may be viewed only as a direct overruling of *Donegan* and the establishment of a *per se* rule which compels the summary disbarment of a New York attorney convicted of any felony in a federal court in this or any other state, regardless of whether our Legislature has denominated the offense as felonious. No longer may consideration be given to the gravity of the offense and mitigating circumstances, no matter how compelling; the drastic result is fixed. This inflexibly harsh rule needlessly rejects the principle that firm discipline can be achieved without sacrificing fairness and reason (see concurring opinion *Matter of Chu,* 42 NY2d 490, 495). The abberational results which today's determination will bring may now be avoided only by legislative action.

* * * * *

Order affirmed, without costs. Opinion Per Curiam. All concur except Wachtler, Fuchsberg and Cooke, JJ., who dissent and vote to reverse in a memorandum.

Order of New York Court of Appeals Amending Remittitur

2 No. 1092

In the Matter of WINTHROP DRAKE THIES, an attorney and counselor-at-law.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent,

WINTHROP DRAKE THIES,

Appellant.

The Court, *sua sponte,* requests the return of the remittitur and, when returned, it will be amended by adding thereto the following: "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that mandatory disbarment pursuant to section 90 of the New York State Judiciary Law, based on conviction of a felony in another jurisdiction for acts which would not constitute a felony in New York State, was a deprivation of equal protection of the laws and of due process of law in violation of the Fourteenth Amendment and was cruelty in violation of the Eighth Amendment. The Court of Appeals considered these contentions and held that appellant was not deprived of his constitutional rights."

Order Appealed From

Amended
Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 389

In the Matter of WINTHROP DRAKE THIES, an attorney and counselor-at law.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent,

WINTHROP DRAKE THIES,

Appellant.

The appellant in the above entitled appeal appeared by Alfred Berman; the respondent appeared by Nicholas C. Cooper.

The Court, after due deliberation, orders and adjudges that the order is affirmed, without costs. Opinion Per Curiam. All concur except Wachtler, Fuchsberg and Cooke, JJ., who dissent and vote to reverse in a memorandum.

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that mandatory disbarment pursuant to section 90 of the New York State Judiciary Law, based on conviction of a felony in another jurisdiction for acts which would not constitute a felony in New York State, was a deprivation of equal protection

of the laws and of due process of law in violation of the Fourteenth Amendment and was cruelty in violation of the Eighth Amendment. The Court of Appeals considered these contentions and held that appellant was not deprived of his constitutional rights.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Second Department there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 19, 1978.
Amended, *sua sponte,* by order of this
Court dated October 26, 1978

s/ Joseph W. Bellacosa

A true copy. Certified this 13th day of November 1978.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa, Clerk of the Court

Notice of Appeal Filed November 3, 1978

COURT OF APPEALS
OF THE STATE OF NEW YORK

No. 389

In the Matter of Winthrop Drake Thies,
an attorney and counselor-at-law

Joint Bar Association Grievance Committee for the
Second and Eleventh Judicial Districts,

Petitioner-Respondent,

Winthrop Drake Thies,

Respondent-Appellant.

Notice of Appeal to the Supreme Court
of the United States

Notice is hereby given that Winthrop Drake Thies, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, affirming the disbarment order of the Appellate Division, Second Judicial Department of New York, dated March 13, 1978, as amended March 23, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Alfred Berman
Alfred Berman
Counsel for Appellant

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JAMES McGOWAN, being duly sworn, deposes and says:

1. I am a secretary in the law office of Alfred Berman, attorney for the Appellant; I am over 18 years of age, reside at 107 West 86 Street, New York, New York 10024, and am not a party to the action.

2. On November 3, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States by mailing a copy by Certified Mail to each of the following, at the respective addresses stated below:

(1) The Clerk of the Court of Appeals,
Albany, New York 12207;

(2) The Clerk of the Appellate Division
Second Department
45 Monroe Place
Brooklyn, New York 11201;

(3) Frank A. Finnerty, Jr., Esq.
Chief Counsel for Appellee
Joint Bar Association Grievance
Committee for the Second and
Eleventh Judicial Districts
16 Court Street
Brooklyn, New York 11241.

JAMES McGOWAN
JAMES McGOWAN

Sworn to before me this
3rd day of November, 1978.
Virginia Petrick
Notary Public

VIRGINIA PETRICK
Notary Public, State of New York
No. 24-4663635
Qualified in Kings County
Commission Expires March 30, 1980

Order of Supreme Court Extending Time to Docket Appeal

SUPREME COURT
OF THE UNITED STATES

No. A-625

WINTHROP DRAKE THIES,

Appellant,

—v.—

JOINT BAR ASSOCIATION COMMITTEE.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including March 16, 1979.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 11th
day of January, 1979

Order of New York Court of Appeals Denying Reargument

No. 76

In the Matter of WINTHROP DRAKE THIES, an Attorney &c.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent,

WINTHROP DRAKE THIES,

Appellant.

Motion for extension of the time within which to move for reargument denied.

Motion for reargument dismissed as untimely.

DECISION COURT OF APPEALS
Feb. 8, 1979

Order of Appellate Division on Motion for Vacatur

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 8, 1978.

HON. MILTON MOLLEN,
Presiding Justice,
HON. JAMES D. HOPKINS,
HON. M. HENRY MARTUSCELLO,
HON. HENRY J. LATHAM,
HON. FRANK D. O'CONNOR,
Associate Justices.

In the Matter of WINTHROP DRAKE THIES,
an attorney and counselor-at-law.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,
Petitioner,

WINTHROP DRAKE THIES,
Respondent.

ORDER

In the above entitled disciplinary proceeding, this court by an order dated March 13, 1978, as amended by a further order dated March 23, 1978, having struck the name of the respondent, Winthrop Drake Thies, from the Roll of Attorneys and Counselors-at-Law; and the said respondent having moved, by a notice of motion dated March 28, 1978, (1) to vacate the said order dated March 13, 1978, as

amended, (2) to restore his name to the said roll, or in the alternative, (3) to stay the further effectiveness of the order which struck his name pending rehearing and/or appeal to the Court of Appeals;

Now, upon the said notice of motion, the affidavit of Alfred Berman with the exhibits annexed thereto and the affidavit of Copal Mintz in support of the said motion and the affidavit of Edward H. Albert in opposition thereto; and Alfred Berman, Esq., having appeared of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby denied in all respects, and it is further

ORDERED that, on the court's own motion, leave to appeal to the Court of Appeals from the said order dated March 13, 1978, as amended by the order dated March 23, 1978, is hereby granted to the respondent.

In this court's opinion, questions of law have arisen which ought to be reviewed by the Court of Appeals.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX B: TEXTS OF STATUTES AND PROPOSED AMENDMENT

U.S. Code, Title 18, "§111. Assaulting, resisting, or impeding certain officers or employees.

Whoever, forcibly assaults, resists, opposes, impedes, intimidates, or interfers with any person designated in section 1114 of this title while engaged in or an account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

New York Judiciary Law, "*§90.* Admission to and removal from practice by Appellate Division; character committees

• • •

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the admiinstration of justice. . .

• • •

4. Any person being an attorney and counsellor-at-law who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

• • •

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven [sic], of the constitution of this state."

Senate Amendment to Replace 18 U.S.C. §111

Section 1302 of S.1437, passed by the U.S. Senate January 30, 1978 to replace 18 U.S.C. §111

"§1302. Obstructing a Government Function by Physical Interference

"(a) OFFENSE.—A person is guilty of an offense if, by means of physical interference or obstacle, he intentionally obstructs or impairs a government function in fact involving:

"(1) the performance by a public servant of an official duty;

"(2) the performance by an inspector of a specific duty imposed by a statute, or by a regulation, rule or order issued pursuant thereto;

"(3) the delivery of mail; or

"(4) the exercise of a right, or the performance of a duty, under a court order, judgment, or decree.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the government function was:

"(1) unlawful; and

"(2) conducted by a public servant who was not acting in good faith.

"(c) PROOF.—The use by a public servant of clearly excessive force in the performance of a government function constitutes prima facie evidence that the public servant was not acting in good faith.

"(d) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor except as provided in paragraph (2);

"(2) an infraction if the physical interference or obstacle:

"(A) is created in the course of picketing, or a parade, display, or other demonstration, otherwise protected by rights of free speech or assembly;

"(B) is nonviolent; and

"(C) does not significantly obstruct or impair a government function.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government function is a federal government function.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1405

WINTHROP DRAKE THIES,

Appellant,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee.

MOTION TO DISMISS APPEAL.

FRANK A. FINNERTY, JR.
Attorney for Appellee
16 Court Street
Brooklyn, N. Y. 11241
(212)624-7851

TABLE OF CONTENTS

Cases Cited

United States Constitution Cited

Statutes Cited

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1405

WINTHROP DRAKE THIES,

Appellant,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee.

MOTION TO DISMISS APPEAL

Preliminary Statement

Appellee moves to dismiss an appeal of a final judgment of the New York Court of Appeals, entered October 19, 1978, amended by order of October 26, 1978, which

affirmed an order entered March 13, 1978, amended March 23, 1978, of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which struck appellant's name from the roll of attorneys of the State of New York pursuant to New York Judiciary Law, Section 90, subdivision 4 (*Matter of Thies*, 61 A.D.2d 1037, affirmed 45 N.Y.2d 865, amended remittitur, 45 N.Y. 2d 924).

The New York Court of Appeals in its amended remittitur, *ibid* at 924, stated:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that mandatory disbarment pursuant to section 90 of the New York State Judiciary Law, based on conviction of a felony in another jurisdiction for acts which would not constitute a felony in New York State, was a deprivation of equal protection of the laws and of due process of law in violation of the Fourteenth Amendment and was cruelty in violation of the Eighth Amendment. The Court of Appeals considered these contentions and held that appellant was not deprived of his constitutional rights.

Appellant made applications to the United States Supreme Court for a stay of the order of disbarment pending submission of this appeal of the judgment which were denied by Justices Thurgood Marshall and Lewis F. Powell on November 15, 1978 and November 27, 1978, respectively. On February 8, 1979, the New York Court of Appeals denied appellant's motion for leave to reargue its prior decision of October 19, 1978, as untimely.

Jurisdiction

Appellant invokes the jurisdiction of this Court under Title 28, U.S.C. 1257(2). Justice Thurgood Marshall of this Court, by order dated January 11, 1979, extended appellant's time to docket this appeal until March 16, 1979.

Statement of the Case

Winthrop Drake Thies was admitted to the practice of law in New York State on December 16, 1959 by the Appellate Division of the Supreme Court, Second Judicial Department. On November 22, 1976, after a trial by jury, appellant was convicted in the United States District Court for the District of New Jersey of assault of a federal officer in violation of Title 18 U.S.C. Section 111, and sentenced as follows:

> The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: the defendant do [sic] pay a fine of $500.00, fine payable forthwith on Count 1.

Appellant was again convicted after a trial by jury in the United States District Court for the District of New Jersey, of conspiracy to sell stolen securities and sale of stolen securities in violation of Title 18, U.S.C. Sections 371, 2315 and 2 and sentenced as follows:

> The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and

ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on Count 1; three (3) years on Count 2, said sentence to run concurrently with the sentence imposed on Count 1.

In December 1977, the United States Circuit Court of Appeals for the Third Circuit affirmed petitioner's felony conviction of assaulting a federal officer, and the United States Supreme Court denied a petition for a writ of certiorari with respect to that conviction. On January 23, 1978, the United States Circuit Court of Appeals did unanimously vacate the judgment of the District Court of February 28, 1977, as stated in petitioner's brief, but the opinion of the Circuit Court noted at the outset that the sole issue in the appeal was not whether the defendants' conduct was a criminal offense, "but whether it was a federal crime" (*U.S.A.* v. *Thies,* 569 F.2d 1268).

POINT ONE

Neither the Automatic Disbarment Statute (Judiciary Law, Section 90, Subdivision 4), nor New York's interpretation thereof (*Matter of Chu)* 42 N.Y.2d 490, infringes upon any constitutionally protected right.

Based upon his conviction of a federal felony crime, petitioner's name was struck from the roll of attorneys and counsellors-at-law of the State of New York, by order of the Appellate Division, Second Judicial Department on March 13, 1978, as amended March 23, 1978, pursuant to New York Judiciary Law Section 90, subdivision 4, which provides:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all' " (supra at 292).

On October 13, 1977, the New York Court of Appeals modified the *Donegan* ruling in *Matter of Chu,* stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of

> such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan* was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493)."

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* 45 N.Y.2d 866, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Petitioner's contention that the application of the *Chu* ruling to him constitutes an *ex post facto* law is wholly without merit.

An *ex post facto* law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to *ex post facto* laws has long been held by this Court to apply solely to criminal statutes (*Baltimore & S.R. Co.* v. *Nesbit,* 51 U.S. 395, see also, *Mahler* v. *Eby,* 264 U.S. 32). The case at bar is not a criminal proceeding.

Disciplinary proceedings have consistently been held to be civil in nature (*Matter of Zuckerman,* 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968], and are not considered to be criminal (*Matter of Unger,* 27 AD2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner's conviction of a federal felony crime has already been affirmed after appellate review and the United States Supreme Court itself declined to consider upon his previous petition for certiorari.

The State of New York has a compelling interest in regulating the practice of professions within its boundaries and is given wide latitude in determining what standards are appropriate for such regulation (*Goldfarb* v. *Virginia St. Bar,* 421 U.S. 773, 792 [1975]).

The interest of any state in the regulation of the practice of law is particularly important. The quality of the practice of law has a vital effect upon the public welfare. The requirement of high standards for attorneys is necessary not only to assure the orderly and efficient administration of justice but also to assure the public of proper counseling and representation. There are few areas of activity which do not have serious legal implications and the authority and responsibility conferred upon attorneys is extraordinary (*Ibid.; Schware* v. *Bd. of Bar Examiners,* 353 U.S. 232, 247 [1957] [Frankfurter, J., concurring]).

Respondent recognizes that the power of a state to regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Konigsberg* v. *Bd. of Examiners,* 353 U.S. 252, 273 [1957]). Respondent also

recognizes that it may not be exercised in a way which infringes upon constitutional rights (*Bates* v. *St. Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691 [1977]; *United Transportation Un.* v. *St. Bar of Michigan,* 401 U.S. 576 [1971]). So long as the state does not exercise its power in such a manner, however, it has autonomous control over the practice of law (*Theard* v. *United States,* 354 U.S. 278, 281 [1957]).

Neither the automatic disbarment statute (Judiciary Law, Section 90, subdivision 4), nor the interpretation thereof by the New York Court of Appeals (*Matter of Chu, infra*), infringes upon any constitutionally protected right. The "right" to practice law may well be an important property or liberty interest within the meaning of the due process clause. It is not a right, however, which has specific constitutional protection. A state may properly adopt a law which adversely affects important property or liberty interests (*San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 31 [1937]). The Constitution merely requires that the legislation be addressed to a legitimate end and that the means taken are reasonable and appropriate to that end. This Court has defined specific Fourteenth Amendment guidelines as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U.S. 420, 425-426; (see also: *Rankin* v. *Shankar,* 23 N.Y.2d 111, 119).

The legislature of New York State has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh,* 25 A.D. 2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely, to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell,* 40 N.Y.2d 153, quoting Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (*People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 471 [Cardozo, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice Bradley, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the

> world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall*, 107 U.S. 265, 274.)" (*supra* at 156)

Moreover, the constitutionality of Judiciary Law, Section 90, in general and subdivision 4 thereof, in particular has been repeatedly upheld (*Mildner* v. *Gulotta*, 405 F. Supp 182, affd 425 U.S. 901; *Gerzof* v. *Gulotta*, 57 A.D.2d 821, mot for lv to app den, 42 N.Y.2d 960; *Matter of Abrams*, 38 A.D.2d 334; *Matter of Glucksman*, 57 A.D.2d 205; see also: *Matter of Mitchell, supra*).

In *Gerzof*, the Court specifically stated:

> "Moreover, it should be emphasized that the United States Supreme Court has found that section 90 does not violate the Federal Constitution . . ." (*supra* at 822).

To the same effect, the Court in Abrams specifically upheld the constitutionality of the automatic disbarment provision:

> "Although subdivision 4 of section 90 provides for automatic disbarment upon conviction (*Matter of Barash*, 20 N.Y.2d 154 [1967]) respondent's constitutional guarantee of due process is safeguarded by his jury trial and appellate review" (*supra* at 336).

This Court has denied each and every petition for certiorari thus far presented based upon the same claims of

constitutional infirmities, by attorneys who were stricken from the roll of Attorneys pursuant to Judiciary Law, § 90, subdivision 4, based upon their conviction of federal felonies. *Peltz* v. *Joint Bar Association Grievance Committee*, 60 AD 2d 587, mot. lv. to app. den. 43 N.Y. 2d 646, cert. den. May 3, 1978, 436 U.S. 926; *Davis* v. *Joint Bar Association Grievance Committee*, 60 AD 2d 613, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. October 2, 1978, —— U.S. ——; *Rosenberg* v. *Joint Bar Association Grievance Committee*, 62 AD 2d 1065, mot. lv. to app. den. 44 N.Y. 2d 648, cert. den. October 30, 1978 —— U.S. ——; *Cahn* v. *Joint Bar Association Grievance Committee*, 59 AD 2d 179, mot. lv. to app. den. 44 N.Y. 2d 641, cert. den. January 8, 1979, —— U.S. ——; *Fayer* v. *Joint Bar Association Grievance Committee*, 63 AD 2d 709, mot. lv. to app. den. 45 N.Y. 2d 708, cert. den. January 8, 1979, —— U.S. ——.

CONCLUSION

This appeal should be dismissed.

Dated: Brooklyn, New York
April 13, 1979

Respectfully submitted,

FRANK A. FINNERTY, JR.
Attorney for Appellee
16 Court Street
Brooklyn, New York 11241
(212) 624-7851

To:

ALFRED BERMAN
SAMUEL M. KONIGSBERG
Attorneys for Appellant
80 Pine Street
New York, New York 10005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1405

WINTHROP DRAKE THIES,

Appellant,

—v.—

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

ALFRED BERMAN
SAMUEL M. KOENIGSBERG
Attorneys for Appellant
80 Pine Street
New York, New York 10005
Telephone (212) 344-2040

April 20, 1979

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

In the

Supreme Court of the United States

October Term, 1978

No. 78-1405

Winthrop Drake Thies,

Appellant,

—v.—

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellee Has Not Overcome Appellant's Constitutional Contentions

The appellee's motion acknowledges, as it must, and as the appellant contends, that an attorney may not be disciplined "in an arbitrary or discriminatory manner" or "in a way which infringes upon constitutional rights" (pp. 7-8). It admits also that the means taken by the legislature toward a legitimate end must be "reasonable and appropriate to that end" (p. 8). But it nowhere shows that an automatic, hearingless disbarment for conduct, grave or, as here, trivial, which may fall within the loose concept

of a Federal "felony" survives these admitted tests. In fact, the motion does not address itself at all to the denial to the appellant of a hearing; the term "hearing" is not once mentioned, a conspicuous omission since our basic complaint against Judiciary Law, § 90(4), is that it provides no hearing.

The interpretation below of § 90(4), appellant has shown, clearly violates constitutional requirements. It also sharply contrasts with the Federal disciplinary cases which, on constitutional grounds, expressly prescribe a hearing even where, for a Federal offense or a state disbarment, court rules specifically mandate an automatic, hearingless disbarment. *Matter of Jones,* 506 F.2d 527, 529 (8th Cir., 1974), involving a Federal felony conviction, and other cases cited in the jurisdictional statement (hereafter "Jur. St."), p. 21.

None of the cases cited by the appellee for its assertion that the constitutionality of § 90(4) has been "repeatedly upheld" (p. 10) sustains its rejection of a hearing under the circumstances here, where the Federal felony was so trivial that it had no state counterpart. In *Matter of Abrams,* 38 App. Div.2d 334 (1st Dept., 1972), the court relied on a New York analogue. In *Matter of Mitchell,* 40 N.Y.2d 153 (1976), the "single question" was whether disbarment was constitutional when the felony conviction remained subject to appellate review (at 155). In *Matter of Glucksman,* 57 App. Div.2d 205 (1st Dept., 1977), the felony conviction was of a state offense; the considerations particularly applicable to a state offense have already been noted (Jur. St., p. 27). No convictions at all, state or Federal, were involved in *Gerzof v. Gulotta,* 57 App. Div.2d 821 (1st Dept., 1977), app. den., 42 N.Y.2d 960 (1977), and the related *Mildner v. Gulotta,* 405 F.Supp. 182 (S.D.N.Y. 1975), aff'd, 425 U.S. 901 (1976). The passage quoted by appellee from *Gerzof* (p. 10) that

> "The Supreme Court has found that section 90 does not violate the Federal Constitution . . . ",

a proposition for which *Gerzof* cites *Mildner,* thus can have no relevance to § 90(4).

Mildner, in fact, vividly describes the extensive hearing procedure before a referee which is regularly utilized by the New York courts in enforcing § 90(2), which authorizes discipline for non-felony misconduct. The procedure is governed by § 90(6), and includes the attorney's right to be heard. Cf. *Goldsmith v. U.S. Board of Tax Appeals,* 270 U.S. 117, 123 (1926).

The appellee justifies the denial of a disciplinary hearing because the jury trial and appellate review in the criminal proceedings are stated to fulfill the due process requirements (p. 10). This ignores the purpose of the disciplinary hearing, which is not to relitigate guilt or innocence, but to afford an opportunity to present circumstances in mitigation of discipline (Jur. St., p. 20). Evidence of this character would often not even be admissible in a criminal trial, but would bear weightily on the extent of the discipline to be imposed. The criminal proceedings cannot supply the due process lacking in the disciplinary proceedings.

Granted that a legislature may enact a statutory discrimination "if any state of facts reasonably may be conceived to justify it" (appellee's brief, pp. 8-9, quoting *McGowan v. Maryland,* 366 U.S. 420, 425-26 [1961]), the appellee nevertheless ignores several factors bearing on the issue of reasonableness here.

First, appellant's challenge to reasonableness was primarily addressed to the recent judicial interpretation of § 90(4). *Matter of Donegan,* 282 N.Y. 285 (1940), had interpreted § 90(4) to be inapplicable to a Federal felony disciplinary proceeding where there was no state felony analogue, an interpretation the legislature has never seen fit to alter. It is the abandonment of *Donegan* by *Matter of Chu,* 42 N.Y.2d 490 (1972), and the application of *Chu* to the inconsequential offense here that render § 90(4) unreasonable and constitutionally intolerable.

The appellee correspondingly ignores the unreasonableness in the catch-all description of a wide variety of Federal offenses as "felonies." The majority in *Chu* and the majority below imported this irrationality into § 90(4), disregarding the actual conduct to which the pejorative is affixed (see Jur. St., pp. 14-15, 18-19, 25-29).

Equally invalid is the appellee's dismissal of appellant's *ex post facto* contention. Tidy compartmentalization of attorney discipline into an exclusively "civil" or exclusively "criminal" pigeonhole is no more useful analytically than compartmentalizing the practice of law into a "right" or "privilege". *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, n. 5 (1957). Sufficient punitive consequences attach to disbarment to require the invocation of the *ex post facto* prohibition, which, contrary to the appellee's view (p. 6), is not of exclusively criminal application (Jur. St., pp. 29-30 and n. 32). *Donegan,* in fact, based its ruling on the "[s]trict construction" of "felony" in the predecessor to § 90(4) (282 N.Y. at 292, quoted by appellee at p. 5), a canon of construction not applicable to purely civil statutes. *Ex post facto* is not diminished by the fact that it results from a retrospectively applied judicial interpretation of a statute rather than from a retrospectively

applied statute. *Bouie v. City of Columbia,* 378 U.S. 347, 353-4 (1964). It applies here in full vigor.

As to recent certiorari petitions seeking review of disbarment judgments, whose denials are cited by the appellee (pp. 10-11), the suggestion is ventured that significant contentions advanced by appellant, particularly addressed to the absence of an administrative burden in cases of this character, the chaotic state of the present Federal criminal statutes, and the utter absence of moral culpability here (Jur. St., pp. 22-24; pp. 14-15, 25-29; 15, 25), have not previously been advanced to the Court. These, coupled with appellant's remaining contentions, it is earnestly urged, warrant review.

CONCLUSION

The Court should note probable jurisdiction, and should reverse the judgment below.

Dated: April 20, 1979

Respectfully submitted,

ALFRED BERMAN
SAMUEL M. KOENIGSBERG
Attorneys for Appellant
80 Pine Street
New York, New York 10005
Telephone (212) 344-2040

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1405

Winthrop Drake Thies,

Appellant

v.

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Appellee

On Appeal From the Court of Appeals of the State of New York

Motion for Leave to File Brief for the New York County Lawyers' Association as Amicus Curiae and Brief

---

Frank R. Rosiny
61 Broadway
New York, New York 10006
(212) 943-6120

Of Counsel
Richard J. Moser
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000
Chairman, Committee on Professional Ethics

April 12, 1979

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-1405

Winthrop Drake Thies,
Appellant,

v.

Joint Bar Association Grievance
Committee for the Second and
Eleventh Judicial Districts,
Appellee.

On Appeal From the Court of Appeals
of the State of New York

Motion for Leave to File Brief for
New York County Lawyer's Association
as Amicus Curiae

The New York County Lawyer's Association moves for leave to file the attached brief amicus curiae in the above-entitled case. This leave is requested on the ground that the Association is in

a position to assist the Court with respect to the issues presented: Whether a New York statute (§ 90(4) of the Judiciary Law) as applied by the New York Court of Appeals to the appellant violates Article 1, Section 10, Clause 1 (ex post facto laws) and the Fourteenth and Eighth Amendments to the Constitution of the United States by retroactive application of a new law to the appellant, depriving him of due process of law and equal protection of the law and by imposing upon him excessive and unusual punishment.

Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this brief was requested of the appellant, which was granted, and of the appellee, which was refused. However, the appellee's counsel stated that he would not oppose such filing.

Interest of Amicus Curiae

The New York County Lawyer's Association is a New York not-for-profit corporation whose membership is composed of

more than 10,000 attorneys most of whom practice in the County of New York, but such membership is open as well to lawyers practising in other jurisdictions. The Association has more than 70 committees of lawyers actively engaged in promoting projects of importance to society, the legal profession and the judicial system, including providing voluntary services to the courts, advocating legal reforms, conducting legal educational courses and endorsing programs to establish and maintain the highest professional standards for the judiciary and practising lawyers.

The Committee on Professional Ethics of the Association is deeply concerned over what appears to it to be a serious violation of the appellant's constitutional rights in this case and over the effect such treatment of lawyers may have on the legal profession. That committee and the Board of Directors of the Association have both unanimously directed and approved the filing of this motion and brief.

Accordingly, permission is sought to submit the attached brief.

April 12, 1979

Respectfully submitted,

Frank R. Rosiny
61 Broadway
New York, New York 10005
(212) 943-1620

Of Counsel
Richard G. Moser
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000
Chairman, Committee on Professional
Ethics

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1405

Winthrop Drake Thies,
Appellant,
v.
Joint Bar Association Grievance Committee
for the Second and Eleventh Judicial Districts,
Appellee.

On Appeal From the Court of Appeals
of the State of New York

BRIEF
For the New York County Lawyers'
Association as Amicus Curiae

Introduction

The appellant was a well regarded practising lawyer in the field of income tax law with an established clientele. He was convicted on November 22, 1976, of an extremely minor offense. The conviction was under a federal law which happens to be labeled a "felony."

Section 90(4) of the New York Judiciary Law provides for automatic disbarment without a hearing if a lawyer is convicted of a "felony". However, at the time of the appellant's conviction, it was the law of New York, and had been for 37 years, that the word "felony" in this statute did not include federal felonies unless they were also cognizable as felonies under New York law. The offense of which this appellant was convicted was a New York misdemeanor, not a felony. Accordingly, at the time of his conviction, he was not subject to the provision for automatic disbarment. In order to disbar him at that time a hearing and consideration of his character and conduct would have been required.

Eleven months after his conviction, the New York Court of Appeals changed the law and held that automatic disbarment applies upon conviction for any federal felony, irrespective

of how petty. The new law was then applied retroactively to the appellant and he was summarily disbarred without being given an opportunity to be heard as to whether the offense of which he was convicted was in any way relevant to his character, conduct or qualification to practice law.

The conduct of the appellant for which he was summarily disbarred without a hearing was exceedingly minor. The trial court called it a "scuffle in the hallway" and a "kindergarten shouting and pushing match" provoked by illegal action on the part of agents of the Federal Bureau of Investigation.

The appellant was engaged in delivering securities to a bank on behalf of a client when he was arrested by agents of the F.B.I. who claimed that he was transporting stolen securities. He was taken before a United States Magistrate who found that the complaint, as drafted, was "insufficient to state probable cause."* Thinking he was free to leave, the appellant tried to do so but the F.B.I. agents

*The charge of transporting stolen securities is not relevant to the case at bar because, although tried and convicted, the appellant's conviction was reversed by the U.S. Court of Appeals for the Third Circuit for lack of federal jurisdiction. Until properly tried, he must be presumed innocent on this issue.

seized him again. He resisted and was forcibly subdued, handcuffed and locked up. The appellant was indicted and tried for resisting the F.B.I. and was found guilty after an instruction to the jury to the effect that even though the conduct of the F.B.I. agents was illegal, the appellant had no right to resist if the F.B.I. agents "subjectively believed" they were acting legally. It is interesting to note that under this instruction, the question of whether the appellant acted properly in resisting the illegal arrest depended not on his mental attitude but on the mental attitude of the F.B.I. agents, something he could not know or control.

Summary of Argument

The New York County Lawyer's Association contends that the appellant was vested with a valuable right in his license to practice law in New York and that this right could not be taken from him (i) by ex post facto application of law created 11 months after his conviction, (ii) without giving him a fair opportunity to be heard as to the miniscule nature of the offense and its irrelevance to his qualifications to practice law, (iii) without affording him rights and protection equal to those accorded to other citizens, or (iv) by imposing a punishment so excessive in relation to the petty nature of the

offense as to be cruel and unusual.

ARGUMENT

1. Ex Post Facto Law

The Penalty of automatic disbarment was imposed pursuant to a law that did not exist at the time of appellant's conviction and was therefore a violation of the Constitutional prohibition against ex post facto laws.

When the appellant was convicted on November 22, 1976, the law of New York was clear. Matter of Donegan, 282 N.Y. 285 (1940), established the principle that automatic disbarment applied only when the conviction was for a New York felony and did not apply to federal felonies cognizable under New York law only as misdemeanors. 282 N.Y. at 292; see also Matter of Levy, 37 N.Y.2d 279 (1975); Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 518 & n. 5 (2d Cir. 1977). The offense of which the appellant was convicted was a misdemeanor under New York law. Accordingly, automatic disbarment did not then apply to him and the appellant was entitled to a hearing on the question of whether his offense involved moral turpitude or any other factor that reflected on his qualification to practice law.

Eleven months later in Matter of Chu,

42 N.Y.2d 490 (1977), the law was changed by the New York Court of Appeals. It was then applied retroactively to the appellant and he was summarily disbarred without any hearing. An unexpected construction or enlargement of a state law effected by court interpretation "operates precisely like an ex post facto law." Marks v. United States, 430 U.S. 188, 191 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964).

Disbarment is an extremely serious punishment. Spevack v. Klein, 385 U.S. 511, 516 (1966). To change the law and apply punishment retroactively violates the ex post facto prohibitions of Article 1, Section 10, Clause 1 of the Constitution.

2. Due Process

Automatic disbarment for a minor offense without giving the lawyer a fair opportunity to present mitigating circumstances deprives him of a valuable right without due process of law in violation of the Fourteenth Amendment.

The right to practice law is a valuable vested right protected by the due process provisions of the Constitution. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 239 n. 5 (1957); Charlton v. Federal Trade Commission, 543 F.2d 903, 906, 177 U.S. App. D.C. 418 (D.C. Cir. 1976). Once a lawyer has been

admitted to practice by the state authorities, he cannot be disbarred unless it is determined that he no longer has the moral character and integrity required for practice of the law, Ex Parte Garland, 71 U.S. (4 Wall.) 333, 379 (1866).

Conviction of a petty offense that has no reasonable connection with the question of his character and integrity is not a proper basis for making that determination. There must be a reasonable relationship between the condemned conduct of the lawyer and the action taken by the state. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

In any event, determination of a matter as serious as disbarment, which is completely ruinous to a lawyer's career and source of livelihood, cannot be made without giving the lawyer a fair opportunity to be heard. Due process requires that he be allowed to show mitigating circumstances and the absence of any reasonable relationship between the offense and his moral or professional character. Federal courts have so held in the case of federal automatic disbarment rules, e.g., Matter of Jones, 506 F.2d 527 (8th Cir. 1974), and the same rule should apply to the states.

3. Equal Protection

A lawyer is entitled under the Fourteenth Amendment to the same equal protection of the laws as any other person.

A law that punishes a lawyer by automatic disbarment without a hearing deprives him of the right to be treated like others who are subject to punishment. In Spevack v. Klein, 385 U.S. 511 (1966), which held that a lawyer could not be disbarred for claiming the privilege against self-incrimination, this Court noted that "lawyers also enjoy first class citizenship." 385 U.S. at 516.

Common criminals, robbers, and murderers all have the right to present mitigating circumstances before being punished. Green v. United States, 365 U.S. 301, 304-05, reh. den. 365 U.S. 890 (1961); Hill v. United States, 368 U.S. 424, reh. den. 369 U.S. 808 (1962). The New York disbarment statute as interpreted by the New York Court of Appeals is wholly inflexible. The ax falls irrespective of the minuteness of the offense or the mitigating circumstances, no matter how compelling. How can a lawyer, about to be punished for committing a crime by being barred for life from practicing his only form of livelihood and being condemned to social and professional disgrace, be deprived of the right to

show that the crime was so petty and insignificant that it does not reflect on his qualifications to practice? To deprive him of this right is to deny him the protection of the laws that is available to all others.

4. Cruel and Unusual Punishment

To disbar a lawyer automatically for a petty offense is unconstitutional as cruel and unusual punishment.

Under the Eighth Amendment, severity of punishment must be reasonably related to the seriousness of the crime. Estelle v. Gamble, 429 U.S. 97, 103 n. 7 (1976); Gregg v. Georgia, 423 U.S. 153, 173 (1976); Weems v. United States, 217 U.S. 349, 367 (1910). The New York statute is seriously deficient in this respect. The drastic punishment of disbarment is imposed automatically no matter how miniscule the offense. Disbarment destroys a lawyer's whole life, his career, his reputation perhaps built up through years of labor, and his only means of livelihood. He is condemned to social and professional disgrace for life. This terrible punishment is inflicted on a New York lawyer who commits an extremely minor crime only because it is labeled a "felony." Such punishment can be wholly out of proportion to the nature of the offense and wholly unrelated to the lawyer's qualification

to practice law. To inflict it without giving him an opportunity to show mitigating circumstances is constitutionally cruel and unusual.

Conclusion

For the foregoing reasons, the provisions of Section 90(4) of the New York Judiciary Law that impose automatic disbarment without any hearing or consideration of mitigating circumstances are unconstitutional and the decision below should be reversed.*

April 12, 1979

Respectfully submitted,

Frank R. Rosiny
61 Broadway
New York, New York 10006
(212) 943-6120

Of Counsel
Richard G. Moser
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000
Chairman, Committee on Professional Ethics

*Bills are pending in the New York legislature to overrule Matter of Chu, supra, but no one knows whether or when they will be enacted.